98TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 98-323

RELATING TO THE CONTEMPT CITATION OF ANNE M. (GORSUCH) BURFORD

JULY 27, 1983.—Referred to the House Calendar and ordered to be printed

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Mr. HOWARD, from the Committee on Public Works and Transportation, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H. Res. 180]

The Committee on Public Works and Transportation, to whom was referred the resolution (H. Res. 180) relating to a citation of contempt, having considered the same, report favorably thereon with amendments and recommend that the resolution as amended do pass.

The amendments are as follows:

Strike out all after the resolving clause and insert in lieu thereof the following:

That the Speaker shall certify this resolution, reciting the additional facts pertinent to the contempt citation of Anne M. (Gorsuch) Burford, to the United States Attorney for the District of Columbia.

Amend the preamble to read as follows:

Whereas, on December 16, 1982, the House of Representatives adopted a resolution citing Anne M. (Gorsuch) Burford, Administrator of the Environmental Protection Agency, for contempt of the House for her refusal to comply with a subpena issued by the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation calling for production of certain records; and

Whereas, on December 17, 1982, the Speaker certified the contempt resolution to the United States Attorney for the District of Columbia as required by law; and

Whereas the United States District Court for the District of Columbia dismissed, upon motion by the House, a civil suit commenced by the Department of Justice against the House

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of Representatives and certain of its officers seeking injunctive and declaratory relief with respect to the aforementioned citation of contempt; and

Whereas upon dismissal of the suit by the court and in order to obtain the most expeditious and timely access to the documents essential to the subcommittee's investigation, representatives of the Subcommittee on Investigations and Oversight, the President of the United States, and the Department of Justice executed an agreement providing for access to and copying of the records previously subpenaed; and

Whereas, following satisfactory implementation of said agreement, the chairman of the subcommittee has, in complete fulfillment of the representations undertaken in the agreement, introduced this resolution, including a recital that implementation of the procedures established therein constitutes a purging of the aforesaid resolution of December 16, 1982, certifying that compliance has been effected and that further proceedings concerning the contumacious conduct of the witness are unnecessary; and

Whereas, by the terms of the agreement, as subsequently modified by the parties, access to and copying of the documents for which the subpena was issued has been in substantial part, effected to the satisfaction of the subcommittee; and

Whereas the House of Representatives asserts that the aforesaid agreement and this resolution, relating solely to the subpena issued by the subcommittee, does not constitute a precedent or concession with respect to the rule of law that substantial compliance with a subpena after certification of contempt for failure or refusal to testify or produce documents pursuant to subpena, constitutes compliance therewith, or that any efforts by a witness subsequent to the return date of a subpena precludes proceeding in accordance with section 194 of title 2, United States Code; and

Whereas the House of Representatives reasserts that the statutory means of compulsion provided by law for compliance with subpenas is applicable to executive branch officials; and

Whereas the House of Representatives reasserts that no officer charged with the responsibility to discharge duties required by section 194 of title 2, United States Code, is, or was at any time, relieved of or excused from the duties imposed upon him by such law: Now, therefore, be it

I. Introduction

On June 23, the Committee on Public Works and Transportation, to whom the resolution relating to a citation of contempt had been referred (H. Res. 180), adopted the resolution, as amended by the Subcommittee on Investigations and Oversight. The resolution, which was offered by Congressman Elliott H. Levitas, contains recitals of additional facts pertinent to the December 16, 1982, contempt citation of

Anne M. (Gorsuch) Burford, then Administrator of the U.S. Environmental Protection Agency, (EPA). Those rectials include, among others, that the Subcommittee on Investigations and Oversight had obtained total access to EPA "Superfund" program records and files and other documents which had previously been subpoenaed, ". . . and that further proceedings concerning the contumacious conduct of the witness are unnecessary . . ." Finally, House Resolution 180:

> *Resolved*, That the Speaker shall certify this resolution reciting the additional facts pertinent to the contempt citation of Anne M. (Gorsuch) Burford, to the United States Attorney for the District of Columbia.

Adoption of House Resolution 180 by the Committee followed the June 7, 1983, markup by the Subcommittee on Investigations and Oversight which, by voice vote, adopted the same resolution with amendments, and reported it, along with the several recitals of facts pertinent to the matter, to the full Committee.

The resolution of contempt adopted by the House of Representatives in the 97th Congress arose out of the issuance of a Subcommittee subpoena for Agency records in November 1982, necessitated by the EPA's refusal to make available to the Subcommittee pertinent and crucial information documenting how the Agency was carrying out its responsibilities under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (P.L. 96–520), the so-called Superfund statute, which provides for the cleaning up of abandoned hazardous chemical waste dumps. The EPA Administrator's refusal to comply with the subpoena and withholding of certain documents led ultimately to the House's citation of contempt.

The refusal of EPA to provide full access to its records precluded the Subcommittee from obtaining information necessary to the discharge of its oversight responsibilities and duties. It also fostered a direct confrontation between the Executive and the Congress over the right of Congress to obtain information it deems necessary to carry out its legislative responsibilities, as vested in the Congress by Article I of the U.S. Constitution.

The Committee's reporting of House Resolution 180 reflects the fact that the Subcommittee on Investigations and Oversight now has that information, in the form of total access to the EPA Superfund program files; copies of the Superfund program records and other documents it was seeking through its subpoena, including those considered "enforcement sensitive" by the EPA and the Department of Justice; and can now discharge its investigative duties and assist the Congress, through the oversight process, in carrying out its legislative responsibilities.

This action also reflects the Committee's determination based upon representations by the Subcommittee, that the procedures for obtaining total access to the Agency's Superfund records set forth in the February 18, 1983, agreement, and the March 22, 1983, amendments to it, executed by representatives of the Subcommittee on Investigations and Oversight, the President of the United States, and the Department of Justice, have been satisfactorily implemented, and that both the EPA and the Department of Justice are honoring that agreement.

The Committee also believes it necessary to point out that it is not intended that this action constitute a precedent or concession with respect to the rule of law that substantial compliance with a subpoena, after a certification by either House of Congress of contempt for failure or refusal to testify or produce documents pursuant to subpoena, constitutes compliance with that subpoena, or that any efforts by a witness, or others on behalf of that witness, subsequent to the return date of a subpoena precludes proceeding in accordance with section 194 of title 2, United States Code (the contempt of Congress statute).[1]

Nor is this section intended to exempt, or set a precedent for exempting, executive branch officials from the punative sanctions provided by law for failure to comply with a subpoena.

Indeed, the decision of the district court dismissing the civil law suit filed by the Department of Justice following the contempt citation establishes that 2 U.S.C. sec. 194 "is an orderly and often approved means of vindicating constitutional claims arising from legislative investigation. . . . Under these provisions, constitutional claims and other objections to congressional investigatory procedures may be raised as defenses in criminal prosecution." *United States* v. *House of Representatives of the United States*, 556 F. Supp. 150, 152 (D.D.C. 1983).

In the following pages, this report provides an overview of the issue being examined by the Subcommittee on Investigations and Oversight—hazardous waste contamination of this Nation's ground and surface waters—and the events that led to the issuance of the subpoena last November, and ultimately, the citation of the former EPA Administrator for contempt last December.

In addition, the report will review what the Subcommittee was, and is assessing with respect to the Superfund law, and the information that was and is being sought, as part of its investigation.

Finally, the report will review the events that have transpired since the contempt citation was voted by the House on December 16, 1982, leading to the Subcommittee's total access of the U.S. Environmental Protection Agency's Superfund program records and files.

II. Background

On December 11, 1980, the Congress responded to inadequacies in Federal laws for dealing with the public health and environmental problems caused by thousands of abandoned hazardous waste sites all across the Nation by enacting the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980" (P.L. 96–510), commonly referred to as the "Superfund" law. That Act created a $1.6 billion trust fund to be used for cleaning up hazardous waste sites and spills of hazardous chemicals. The monies for the Fund, to be collected over a five-year period commencing in 1981, are derived pri-

[1] Because it is a criminal statute, serious questions surround the ability of a contemnor to "purge" by virtue of later compliance. It is at least settled that later compliance with the committee's request is not a defense to a prosecution under the statute. *United States* v. *Brewster*, 154 F. Supp. 126, 136–37 (D.D.C. 1957) *rev'd on other grounds* 255 F. 2d 899 (D.C. Cir. 1958). Of course, the Committee does not definitively here resolve any legal questions concerning the inability to purge a criminal contempt, but makes clear its intent that nothing in the resolution should be deemed to constitute a purge of the criminal contempt.

marily from taxes on oil and certain chemicals; 12.5 percent of the Fund's monies come from general tax revenues.

Among the key features of the Superfund Act is a grant of authority to the Federal government to act to control and/or eliminate the threat of environmental contamination from a hazardous waste site or spill when a responsible party cannot act or cannot be identified in a timely fashion.

Another significant feature is the law's liability provisions. Essentially, those responsible for creating the threat or actual incidence of hazardous waste contamination, including those who generate, transport, treat, store, or dispose, of hazardous wastes who do not act to clean up a site themselves, are required to reimburse the government for cleanup costs and for any damage to natural resources. Further, under the law, the government can assess treble damages against responsible parties that refuse to cooperate in cleaning up a site.

On August 14, 1981, President Reagan issued Executive Order 12316, "Responses to Environmental Damage," which ordered, among other things, that

> The responsibility for the amendment of the NCP (National Contingency Plan) and all of the other functions vested in the President by Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, . . . is delegated to the Administrator of the Environmental Protection Agency.

Executive Order 12316 also makes the EPA Administrator responsible for (1) cleaning up abandoned or inoperative hazardous waste sites and/or determining that the responsible parties will do so; (2) carrying out the enforcement provisions of the Act, including the issuance of administrative orders and the initiation of action in the U.S. Courts for necessary remedies, including fines and penalties; and (3) managing the "Hazardous Substance Response Trust Fund." (E.O. 12316 of August 14, 1981, at 170 and 171.)

More than a year later, in March of 1982, the Subcommittee opened a series of public hearings on an investigation that had been initiated several months earlier on the problems caused by hazardous waste contamination of the Nation's ground and surface waters.

Testimony received during the Subcommittee's March 1982 hearings, and during additional hearings in July 1982, raised a number of concerns about the adequacy of the Superfund law, and the extent to which the EPA's efforts to carry it out were both satisfactory and in keeping with the intent of the law.

Additionally, public disclosure of alleged illegal hazardous waste disposal activities by a Waterbury, Connecticut chemical handling firm (New York Times, October 27, 1982, at B3) and subsequent inquiries of EPA officials by the Subcommittee's investigative staff suggested that current efforts to prevent improper and illegal disposal of hazardous wastes remained inadequate.

There was also evidence suggesting that EPA resources for pursuing leads about responsible parties were inadequate; that documents that would help to establish the responsibility of parties for some sites had not been expeditiously obtained; that contracts for cleaning

up hazardous waste sites were going to some of the very companies that had a hand in creating them; that wastes from some sites being cleaned up at public expense appeared to have been improperly disposed of, creating new cleanup problems; and, that EPA's imposition of administrative penalties on violators of hazardous substance and waste laws over the past several years had been oriented toward seeking minimum penalties, which were often further reduced during negotiations with responsible parties.

As a result, the Subcommittee's inquiry continued following its July 1982 hearings and, with respect to the Superfund statute, focused heavily on the following areas:

Whether there were statutory requirements and/or administrative policies, practices and procedures that impede the government's (EPA's) ability to function effectively and achieve the objectives of the law, or whether amendments to the statute are needed;

Whether the Superfund law's enforcement provisions were being fully and effectively carried out;

Whether adequate efforts had been or were being made to obtain and/or recover the full costs of cleaning up hazardous waste sites from responsible parties;

Whether the Fund, and the existing sources and amounts of revenue for it, particularly the tax on oil and chemicals, was adequate to address both known and potential hazardous waste sites and chemical spills; and

The nature and extent to which EPA policy in the administration and management of the Fund, and its execution of responsibilities under the Superfund law, were influenced by considerations of fiscal economy, concern for the environment, resource limitations, and general uncertainty over specific provisions of the law.

Answers to these concerns would, in turn, assist the Subcommittee in identifying deficiencies in both the Superfund law and its administration. Those same findings would also help the Subcommittee to assess the adequacy of existing statutory penalties for deterring the continuance of illegal or improper disposal of hazardous wastes and to evaluate whether the Superfund law and related Federal statutes and their implementing regulations may be combining to create incentives, rather than disincentives for generators of hazardous wastes to illegally dispose of toxic substances.

In pursuit of information that would help the Subcommittee make these assessments, efforts were undertaken by the Subcommittee's investigators to interview EPA officials and others, and to review the agency's enforcement files. Among the questions to be answered:

Were responsible parties being held liable for their full share of the costs of cleaning up a hazardous waste site?

Was the EPA agreeing to limit the liability of some responsible parties, and not others; and what was the effect of this on the program and the Fund's resources?

What was the basis for the agency deciding whether it would assess civil penalties, and how much those penalties should be?

What was the EPA's basis for deciding whether it would refer a case to the Justice Department for prosecution of either civil or criminal penalties?

Why were some cases being settled or handled administratively, and others being litigated?

Was the Agency capable to make substantive financial analyses of the responsible parties, and how did this affect its decisions to obtain or recover cleanup costs from responsible parties, or on pursue penalties through litigation?

To what extent did the ability to identify responsible parties affect Agency enforcement decisions about who should pay how much of the cleanup costs and whether efforts should be made to litigate, or settle out of court?

Was valuable and critical evidence, particularly potentially criminal evidence, lost or destroyed due to the Agency's inability to move rapidly in civil and criminal matters?

Were cleanup and other efforts to negotiate settlements or proceed with litigation hindered or rushed in any way, or being stalled, and if so, why?

Were there deficiencies in the statute that hampered the EPA's enforcement ability?

In September of 1982, when the Subcommittee sought to shift its investigation of the Superfund program from that of a general overview to a focused examination of specific cases, the EPA and the Department of Justice precluded Subcommittee access to the EPA's Superfund program enforcement files.

Initially, EPA and Justice Department officials claimed that the files that were being sought by the Subcommittee contained documents that were considered "enforcement sensitive," a term apparently manufactured by the EPA in consultation with the Department of Justice, and that the disclosure of these documents to the Subcommittee would compromise the Agency's abilities to carry out their responsibilities. At that time, though, the EPA and the Justice Department officials involved were unable to identify or list just which documents were, in their opinion, enforcement sensitive. This, they claimed, could only he achieved through an elaborate review of the EPA's files by EPA and Justice Department attorneys. Consequently, entire files were withheld until such time as this prescreening process could be effected.

Preferring to avoid a confrontation over the matter, and recognizing the need to ensure the confidentiality of sensitive EPA documents, the Subcommittee sought to find an alternative method of review that would protect the integrity of the government's case while simultaneously allowing the Subcommittee to pursue its investigation in a timely and reasonable fashion.

During the latter half of September 1982, Subcommittee Members and staff had conversations by phone and various meetings with both EPA and the Department of Justice officials, which culminated in a meeting on October 1, 1982, which only EPA officials and Subcommittee Members and staff attended. At that meeting, the EPA Deputy Administrator, Dr. John Hernandez, agreed to an arrangement with the Subcommittee whereby the Subcommittee would have total access

to all agency Superfund enforcement documents, without prior screening of the files by the EPA or the Department of Justice. Any documents considered to be enforcement-sensitive by EPA officials would be retained in the custody of the EPA, and the Subcommittee would pursue acquisition of those documents on a case-by-case basis.

Unfortunately, this agreement was short lived. Subsequent to Subcommittee staff review of the EPA's files of several Superfund cases in their New York City (Region II) and Boston (Region I) offices, the staff was advised by both EPA and Department of Justice officials on October 29, 1982, that the agreement would no longer be honored, and that the Subcommittee would no longer have access to the Agency's enforcement files.

On November 22, 1982, the Subcommittee served EPA Administrator Anne M. (Gorsuch) Burford with a subpoena for the documents in question. Because the EPA had never identified just which documents it sought to withhold, and because the Subcommittee's investigators were not allowed to see the Agency's files, the Subcommittee sought through its subpoena only enforcement related documents, that generally comprised five to ten percent of the records on many cases. Excepted from its request were those technical studies and reports and other business documents, such as waste generator bills-of-lading, that generally comprise some 90 to 95 percent of the material in many Superfund case files.

On December 2, 1982, the return date of the subpoena, the Administrator appeared before the Subcommittee and advised that she had been instructed by the President, in a memo to her dated November 30, 1982, to withhold subpoenaed documents from the Subcommittee. (House Rept. 97–968, at 42, 43.) While the Administrator was able to advise the Subcommittee that several dozen such documents had already been identified, she also acknowledged that many more would ultimately be withheld. Estimates of how many ranged from several hundred to several thousand.

As a result of this action, the Subcommittee approved a resolution that same day citing the Administrator for contempt, an action that was repeated on December 10 by the full Public Works and Transportation Committee.

III. The Claim of Executive Privilege

Prior to the taking up of the contempt resolution by the full Committee on Public Works and Transportation on December 10, and prior to the House's action on this matter on December 16, 1982, two additional attempts to compromise were made by House Members.

In the first instance, the Subcommittee Chairman, Congressman Elliott H. Levitas, meeting with representatives of the Attorney General on December 8, 1982, proposed that the Subcommittee would have the right to review all documents, but that those documents considered by EPA to be enforcement-sensitive would remain in the custody of the EPA, and that they would be made available to Subcommittee Members and staff for reviewing purposes only under executive session rules. This was rejected. Assistant Attorney General Robert A. McConnell's December 9, 1982, letter to the Subcommittee Chairman explained:

> The principal problem which we have with the . . . proposal is that it contemplates that the President will lose control over the contents of materials which those who assist him in enforcing the law have determined to be in a narrow catetory of documents the release of which would adversely affect the Executive Branch's ability to enforce the law. (H. Rept. 97–968 at 66 and 67.)

A similar proposal with significant restrictions on the number of Subcommittee staff that would have access was also made by the Representatives of the House Majority and Minority leadership on December 16, 1982, several hours prior to the vote on the contempt citation. This was rejected as well.

In fact, in each instance wherein the EPA Administrator, the Attorney General, and ultimately the President, rejected requests for access to the EPA's Superfund program's files, or offers to compromise, the argument put forward was the same: that a congressional inquiry into these types of matters would wrest from the Executive its ability to "take care that the laws be faithfully executed," as set forth in Section 3, Article II of the U.S. Constitution.

Yet this constitutional construction by the Attorney General, which was based almost exclusively on his interpretation of past instances of attempts by the Executive to withhold documents from Congress and his predecessors' opinions on the matter, was rejected by the Committee as being "slipshod" in nature. (H. Rept. 97–968 at 11.) As noted in the December 8, 1982, opinion of the General Counsel to the Clerk of the House in response to the Attorney General's November 30, 1982, opinion (H. Rept. 97–968, at 30):

> Congress does not forgo inquiry simply because it may produce information on the government's strategies and weaknesses; the only way to correct either bad law or bad administration is to examine these matters. (H. Rept. 97–968, at 61)

To accept the position of the Attorney General would mean that Congress would, in effect, destroy or diminish its own legislative powers in passing laws, particularly oversight, thus sealing off from Congress an effective means for determining the sufficiency of existing law.

It is argued that Article II, Sec. 3 of the U.S. Constitution neither expressly nor impliedly authorizes the President, or any Executive agency, to withhold documents essential to evaluating the administration of the laws passed by Congress which the President is to "faithfully" execute.

On December 16, 1982, at approximately 10 p.m., the House of Representatives, by a vote of 259 to 105, adopted a resolution finding Anne M. (Gorsuch) Burford in criminal contempt, not withstanding the Attorney General's arguments, and the President's claim of Executive Privilege:

> *Resolved*, That the Speaker of the House of Representatives certify the report of the Committee on Public Works and Transportation as to the contumacious conduct of Anne M. Gorsuch, as Administrator, United States Environmental

Protection Agency, in failing and refusing to furnish certain documents in compliance with a subpoena duces tecum of a duly constituted subcommittee of said committee served upon Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, and as ordered by the subcommittee, together with all of the facts in connection therewith, under seal of the House of Representatives, to the United States attorney for the District of Columbia, to the end that Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, may be proceeded against in the manner and form provided by law. (H. Res. 632, 97th Congress)

IV. Lawsuit Against the House of Representatives

Moments after that vote by the House, and before the Speaker of the House had actually certified the resolution of contempt to the United States attorney for presentment to the grand jury (see Appendix E), the Department of Justice filed a civil lawsuit in the U.S. District Court for the District of Columbia, seeking to enjoin and restrain the House of Representatives from taking any further action to enforce the Subcommittee's subpoena and to declare the subpoena unconstitutional.

The Department of Justice argued that the Subcommittee's efforts to compel the production of the EPA's Superfund program's enforcement records were unconstitutional because the ". . . dissemination of such documents to the public or to Congress would impair the President's constitutional duty to ensure that the laws be faithfully executed." (*U.S.* v. *House of Rep., et al.*, C.A. 82–3583, Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendants' Motion To Dismiss, at 55.)

In addition, the Department of Justice also claimed that the EPA Administrator could not be subject to a criminal prosecution under the contempt statute (2 U.S.C. Sec. 194) because she was an executive official (*U.S.* v. *House of Rep. of the U.S.*, Complaint, Prayer for Relief, para. C) ". . . instructed by the President to withhold such privileged documents from the public and the Congress . . ." (Id., at para. 4).

By letter of December 27, 1982, Stanley S. Harris, United States Attorney for the District of Columbia, advised the Speaker of the House, Congressman Thomas P. O'Neill, Jr., that he had ". . . concluded that it would not be appropriate for me to consider bringing this matter before a grand jury until the civil action has been resolved." [2] (See Appendix F.)

On December 30, 1982, the House filed a motion with the District Court seeking to have the Department of Justice's lawsuit dismissed. Primary among the House's arguments was that the court lacked jurisdiction over the subject matter and over the House Members and Officers actually named as defendants in the suit,[3] the latter due to the

[2] As of the writing of this report, the U.S. Attorney has yet to bring the matter of the House's December 16, 1982 contempt citation before the grand jury.

[3] Defendents actually named in the Justice Department's suit (Second Amended Complaint) were the Honorable James J. Howard, Chairman of the Committee on Public Works and Transportation; the Honorable Elliott H. Levitas, Chairman, Subcommittee on Investigations and Oversight; the Honorable Thomas P. O'Neill, Speaker of the House of Representatives; Edmund L. Henshaw, Jr., Clerk of the House of Representatives; Jack Russ, Sergeant at Arms of the House of Representatives; and James T. Molloy, Doorkeeper, House of Representatives. These individuals were sued only in their official capacities.

protection from suit by virtue of the "Speech or Debate" clause of Section 6 of the Article I of the U.S. Constitution.

On January 14, the District Court issued an order for a hearing only on the House's motion to dismiss, which was held on February 1, 1983, and on February 3, 1983, the U.S. District Court for the District of Columbia dismissed the Department of Justice's civil suit against the House of Representatives.

In his memorandum opinion, District Court Judge John Lewis Smith, Jr., noted the Court's historical reluctance to interfere in matters such as those raised in this case, and that the claims of the Department of Justice could be raised as part of a legal defense in a criminal prosecution, under the contempt statute.

The Judge's memorandum notes, in pertinent part:[4]

> Section 192 of Title 2 of the United States Code provides that a subpoenaed witness who refuses "to produce papers upon any matter under inquiry before either House . . . or any committee of either House of Congress", shall be guilty of a misdemeanor "punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months." Once an individual has been found in contempt of either House of Congress, a contempt order is presented to the President of the Senate or the Speaker of the House of Representatives for certification. 2 U.S.C. Sec. 194. The President or Speaker in turn delivers the contempt citation to the appropriate United States Attorney. The United States Attorney is then required to bring the matter before the grand jury. Id.
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> The statutory provisions concerning penalties for contempt of Congress, 2 U.S.C. Sec. 192 and Sec. 194, constitute "an orderly and often approved means of vindicating constitutional claims arising from a legislative investigation." *Sanders v. McClellan*, 463 F.2d 894, 899 (D.C. Cir. 1972). Under these provisions, constitutional claims and other objections to congressional investigatory procedures may be raised as defenses in a criminal prosecution. See *Barenblatt v. United States*, 360 U.S. 109, (1959); *Ansara v. Eastland*, 442 F.2d 751 (D.C. Cir. 1971); (D.C. Cir. 1971); *United States v. Tobin*, 306 F.2d 270, 276 (D.C. Cir. 1962). Courts have been extremely reluctant to interfere with the statutory scheme by considering cases brought by recalcitrant witnesses seeking declaratory or injunctive relief. *See, e.g., Eastland v. United States Servicemen's Fund*, 421 U.S. 491, (1975); *Ansara v. Eastland*, 442 F.2d at 754.
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> Courts have a duty to avoid unnecessarily deciding constitutional issues. *United States v. Rumely*, 345 U.S. 41, 45–46, (1952). When constitutional disputes arise concerning the respective powers of the Legislative and Executive Branches,

[4] See Appendix G for full text.

judicial intervention should be delayed until all possibilities for settlement have been exhausted. *See United States v. American Telephone and Telegraph*, 551 F.2d at 393–395. Judicial restraint is essential to maintain the delicate balance of powers among the branches established by the Constitution. *See id.* Since the controversy which has led to *United States v. House of Representatives* clearly raises difficult constitutional questions in the context of an intragovernmental dispute, the Court should not address these issues until circumstances indicate that judicial intervention is necessary.

The gravamen of plaintiffs' complaint is that executive privilege is a valid defense to congressional demands for sensitive law enforcement information from the EPA. Plaintiffs have, thus, raised this executive privilege defense as the basis for affirmative relief. Judicial resolution of this constitutional claim, however, will never become necessary unless Administrator Gorsuch becomes a defendant in either a criminal contempt proceeding or other legal action taken by Congress. *See, e.g., Ansara v. Eastland*, 441 F.2d at 753–754. The difficulties apparent in prosecuting Administrator Gorsuch for contempt of Congress should encourage the two branches to settle their differences without further judicial involvement. Compromise and cooperation, rather than confrontation, should be the aim of the parties. The Court, therefore, finds that to entertain this declaratory judgment action would be an improper exercise of the discretion granted by the Declaratory Judgment Act, 28 U.S.C. Sec. 2201. *See Hanes Corp. v. Millard*, 531 F.2d 585, 591 (D.C. Cir. 1976).

V. The Memorandum of Understanding

Following the Court's dismissal of the lawsuit, representatives of the President contacted Subcommittee Chairman Levitas, asking to meet to attempt to work out a solution to the matter. The Subcommittee Chairman, responding to the District Court Judge's request that a compromise be reached if possible, agreed to the meeting.

Accordingly, on February 12, 1983, Fred Fielding, Counsel to the President, Edward Schmults, Deputy Attorney General, and Elliott H. Levitas, Chairman of the Public Works and Transportation Committee's Subcommittee on Investigations and Oversight began to negotiate an agreement that would both satisfy the Subcommittee's need to have total access to the EPA's Superfund records, and all parties' concerns that the confidentiality of sensitive EPA documents be protected, particularly those the disclosure of which would have a potentially adverse effect on pending or contemplated litigation.

On February 18, 1983, an agreement was reached, and a formal Memorandum of Understanding [see Appendix A] was signed by the negotiators, setting forth a process by which the EPA and Department of Justice could designate certain documents as being in their category of "enforcement sensitive" and providing for review of those documents by both Members and staff of the Subcommittee.

While the Memorandum of Understanding did not resolve the question of Executive Privilege,[5] it did provide a mechanism whereby a resolution could be introduced in the House of Representatives to resolve the matter of the citation of contempt against the EPA Administrator.

Specifically, the agreement stated, in paragraph seven that: "Following satisfactory implementation of the procedures set forth herein. the Chairman of the Subcommittee represents that he will undertake and use his best effort to introduce an appropriate resolution, for consideration by the Committee and the House of Representatives," and that the resolution would contain various recitals, including ". . . that the House finds no reason for further proceedings (against the Administrator); and providing for the Speaker to certify all of the foregoing to the United States Attorney."

On February 22, 1983, the first business day following the signing of the Memorandum of Understanding, the Subcommittee, pursuant to the terms of the agreement, advised the EPA of ". . . a reasonable number of National Priority List sites which are the subject of its official inquiries. . . ." Included were Seymour Recycling Corp., Seymour, Indiana; Bridgeport Rental and Oil Services, Bridgeport, New Jersey; Pollution Abatement Services (PAS), Oswego, New York; Keefe Environmental Services, Epping, New Hampshire; Ottati & Goss/Kingston Steel Drum, Kingston, New Hampshire; and Stringfellow Acid Pits, Glen Avon, California.

In addition to requesting that the EPA provide the Subcommittee with those documents considered enforcement-sensitive on these six sites, the Subcommittee began to review other documents in the EPA files on that same day.

On February 25, 1983, the Subcommittee Members and staff met in Executive Session with EPA and Department of Justice officials to receive and review copies of the 64 documents that had been withheld from the Subcommittee (and the House Energy and Commerce Oversight Subcommittee) in December 1982. Pursuant to the terms of the February 18, 1983, Memorandum of Understanding, documents had been redacted, or edited, and, where requested by the Subcommittee, unedited copies were to be provided to the Subcommittee and its staff for review. Custody of the unedited documents would remain with the EPA, with the caveat that the Subcommittee would ". . . have the right to pursue all lawful efforts to obtain the documents in question."

Following further review of the 64 documents, the Subcommittee again met in Executive Session on March 2, 1983, at which time EPA and Department of Justice officials provided detailed descriptions of document pertaining to the following Superfund cases: Chem-Dyne Corporation, Hamilton, Ohio; Seymour Recycling Corp., Seymour, Indiana; Homestake Mining Company, Milan, New Mexico; and Price Landfill, Pleasantville, New Jersey. The EPA-designated enforcement sensitive document pertaining to the Homestake Mining case was reviewed by the Subcommittee staff in unredacted form.

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[5] Paragraph 4 of the February 18, 1933 Memorandum of Understanding notes in pertinent part: "Nothing in this memorandum shall constitute a waiver of Executive Privilege with regard to any document. The Subcommittee does not acknowledge the applicability of Executive Privilege to any document subpoenaed."

Subsequent to that meeting, the President determined to provide more direct access to the EPA's Superfund documents and, on March 22, 1983, an amendment to the earlier Memorandum of Understanding [see appendix B] was agreed to by the three signatories to the original agreement.

Under the terms of the March 22d amendment, the Subcommittee Members and staff would have total access to all EPA Superfund files, either at the EPA's various offices, or at the Subcommittee's offices. Further, the Subcommittee could request copies of any document it desired, and at the time the copy was made available to the Subcommittee, EPA officials were to indicate whether they were to be treated as enforcement sensitive, or simply confidential. No redacting, or editing, of any documents would occur.

Two days later, on March 24, EPA officials delivered six sets of files containing several dozen documents they had designated as "enforcement sensitive", in unedited form, to the Subcommittee's offices. Each set pertained to one of the six sites initially designated for review by the Subcommittee following the signing of the February 18, 1983 Memorandum of Understanding.

On April 7, 8, 11, and 15, 1983, the Subcommittee's investigative staff examined Superfund program case files in the EPA Office of Waste Programs Enforcement and Office of Legal and Enforcement Counsel-Waste at their respective Headquarters locations in Washington, D.C. Copies of 74 documents were requested, and were subsequently provided to the Subcommittee.

On April 19 through 22, 1983, the Subcommittee's investigators traveled to the EPA's Region V offices in Chicago, Ill., and proceeded to examine certain of the agency's Superfund program files maintained at that location. Copies of 57 documents were requested, and subsequently provided to the Subcommittee.

On April 2, 1983, the Subcommittee's investigators returned to the EPA Headquarter's Office of Waste Programs Enforcement and continued to review files of EPA-designated "enforcement sensitive" documents. Several documents were copied by the Subcommittee's investigators at that time.

On April 28 and 29, 1983, the Subcommittee's investigators traveled to the EPA's Region I offices in Boston and reviewed several files, including a number containing enforcement sensitive documents. Copies of several were made at that time and provided to the Subcommittee's investigators.

On June 7, 1983, the Subcommittee met to consider H. Res. 180, "Relating to a citation of contempt," and received testimony from its investigative staff concerning the foregoing events. The Subcommittee's investigators testified that EPA and Justice Department officials had assisted the Subcommittee's investigators in their review of files and in securing copies of documents, as called for by the February 18, 1983, Memorandum of Understanding. Additionally, the Subcommittee's investigators advised the EPA officials had also made themselves available for interviews and questioning concerning the implementation of the Superfund program, and were highly cooperative. (June 7, 1983, Invest. and Oversight Subc. Trans. at 22.)

VI. The Integrity of the EPA Files

In negotiating the February 18, 1983, Memorandum of Understanding with the President's counsel and the Deputy Attorney General, one area proved to be particularly troublesome: assuring the integrity of the EPA's files.

Concerns over the EPA's files stemmed from the disclosure in February 1983 that paper shredders had been moved into the EPA's Superfund program offices; that there were no regulations or controls governing the use of those shredders; that the EPA Superfund program enforcement offices did not index or systematize the filing of its documents on the Superfund cases; and that the Subcommittee had been unable to review those files and inventory the documents in them.

As a means of responding to this concern, the parties signatory to the February 18, 1983, Memorandum of Understanding (and the March 22, 1983 amendment) agreed to the following requirement:

> The Administrator, or a formally designated Assistant Administrator, or appropriate Regional Administrator will certify to the Subcommittee that the access provided and the documents produced represent a diligent good faith effort to fully comply with the Subcommittee's request for access. (Feb. 18, 1983, Memorandum of Understanding, p. 2.)

For this reason, the Subcommittee requested that Mr. Lee M. Thomas, then-Acting EPA Deputy Administrator, appear before the Subcommittee to review what steps the agency had taken to comply with that requirement of the Memorandum.

In testimony before the Subcommittee on June 7, 1983, Mr. Thomas advised that on April 19, 1983, the then-Acting EPA Administrator, Lee L. Verstandig, issued a memorandum (see Appendix C) to all of the agency's regional, associate, and assistant administrators concerning the procedures to be followed in carrying out the terms of the February 18th agreement, particularly those relating to the certification of the integrity of the files. Mr. Thomas also provided certifications from himself and four other agency officials having custody or responsibility for cases then being examined in detail by the Subcommittee. (See Appendix D.)

Testimony and other information provided to the Subcommittee in February and March 1983 also indicated that there were documents in the EPA's Superfund enforcement files that would shed some light on the question of political manipulation of the Superfund program during the fall-1982 election, the so-called "election tracking" system. During the June 7th meeting of the Subcommittee, questions were raised as to whether such documents had been found in the agency's files.

Both the Subcommittee's investigators and Mr. Thomas of the EPA indicated that such documents did exist and that copies of them had been obtained and secured in the Subcommittee's files. The Subcommittee's investigators also advised the Members that as of that time, June 7, 1983, many of those documents had been referred to the Department of Justice by the former EPA Administrator with a re-

quest that an inquiry be made as to the possibility of legal improprieties by EPA employees.[6]

VII. House Resolution 180, Relating to a Citation of Contempt

Following the testimony by the Subcommittee's investigative staff and the EPA Acting Deputy Administrator, the Subcommittee, a majority being present, adopted House Resolution 180, with an amendment. The resolution, as amended, states that:

> Whereas, on December 16, 1982, the House of Representatives adopted a resolution citing Anne M. (Gorsuch) Burford, Administrator of the Environmental Protection Agency, for contempt of the House for her refusal to comply with a subpoena issued by the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation calling for production of certain records; and
>
> Whereas, on December 17, 1982, the Speaker certified the contempt resolution to the United States Attorney for the District of Columbia as required by law; and
>
> Whereas the United States District court for the District of Columbia dismissed, upon motion by the House, a civil suit commenced by the Department of Justice against the House of Representatives and certain of its officers seeking injunctive and declaratory relief with respect to the aforementioned citation of contempt; and
>
> Whereas upon dismissal of the suit by the court and in order to obtain the most expeditious and timely access to the documents essential to the Subcommittee's investigation, representatives of the Subcommittee on Investigations and Oversight, the President of the United States, and the Department of Justice executed an agreement providing for access to and copying of the records previously subpoenaed; and
>
> Whereas, following satisfactory implementation of said agreement, the Chairman of the Subcommittee has, in complete fulfillment of the representations undertaken in the agreement, introduced this resolution, including a recital that implementation of the procedures established therein constitutes a purging of the aforesaid resolution of December 18, 1982, certifying that compliance has been effected and that further proceedings concerning the contumacious conduct of the witnesses are unnecessary; and
>
> Whereas, by the terms of the agreement, as subsequently modified by the parties, access to and copying of the documents for which the subpoena was issued has been in substantial part, effected to the satisfaction of the Subcommittee; and
>
> Whereas the House of Representatives asserts that the aforesaid agreement and this resolution, relating solely to the subpoena issued by the Subcommittee, does not constitute a

[6] As of the writing of this report, that matter of political manipulation of the Superfund and "election tracking" were still under investigation by the Subcommittee and the Department of Justice.

precedent or concession with respect to the rule of law that substantial compliance with a subpoena after certification of contempt for failure or refusal to testify or produce documents pursuant to subpoena, constitutes compliance therewith, or that any efforts by a witness subsequent to the return date of a subpoena precludes proceeding in accordance with section 194 of title 2, United States Code; and

Whereas the House of Representatives reasserts that the statutory means of compulsion provided by law for compliance with subpoenas is applicable to executive branch officials; and

Whereas the House of Representatives reasserts that no officer charged with the responsibility to discharge duties required by section 194 of title 2, United States Code, is, or was at any time, relieved of or excused from the duties imposed upon him by such law: Now, therefore, be it

Resolved, That the Speaker shall certify this resolution, reciting the additional facts pertinent to the contempt citation of Anne M. (Gorsuch) Burford, to the United States Attorney for the District of Columbia.

On June 23, 1983, the full Committee on Public Works and Transportation met to consider House Resolution 180, as it had been reported to it by the Investigations and Oversight Subcommittee.

Based on the record of testimony concerning the events since February 18, 1983, the Committee concluded that substantial compliance with the Subcommittee's request for access to the EPA's Superfund program files had been achieved. While substantial compliance cannot, and does not mean the subpoena itself had been complied with, the Committee is satisfied that what was originally being sought by the Subcommittee, information pertaining to the way in which the EPA was carrying out its legislatively mandated responsibilities under the 1980 Superfund law, is now available and that the Subcommittee on Investigations and Oversight can now carry out its mandated functions.

Further, the Committee believes that officials of the EPA have now determined to cooperate fully with the Subcommittee in its investigation, and that this has been demonstrated in the Agency's willingness to make all of its records and personnel available to the Subcommittee in a cooperative and timely fashion.

Finally, the Committee feels compelled to observe that the testimony and other evidence presented prevent it from being able to unequivocally attest to the integrity of the EPA's Superfund program files. The Committee does believe, however, that the files, records and other documents being made available do represent a good faith effort by the Agency to make available all of the information that exists on the Superfund program cases. The Committee also believes that the Agency is honoring the February 18, 1983, Memorandum of Understanding and the subsequent amendment to it on March 22, 1982. It therefore, on June 23, 1983, a majority being present, voted to adopt House Resolution 180, as it had been reported to the Committee by the Subcommittee on Investigations and Oversight.

[Appendix items A–G follow:]

APPENDIX A

Memorandum Of Understanding Between The Committee On Public Works And Transportation And The Department Of Justice Concerning Documents Subpoenaed From Environmental Protection Agency

1. The Subcommittee on Investigations and Oversight ("Subcommittee") of the House Committee on Public Works and Transportation ("Committee") will obtain access to all documents in Environmental Protection Agency ("EPA") files relating to Superfund sites selected by the Subcommittee for review, except those documents designated by EPA or the Department of Justice ("DOJ") to be "enforcement sensitive," as defined herein. The Executive Branch will not shield from Subcommittee review any document that evidences any criminal or unethical conduct by any executive department official or employee.

The Subcommittee, or the Subcommittee through its investigators, will initially designate a reasonable number of National Priority List sites which are the subject of its official inquiries undertaken pursuant to its investigation and oversight responsibilities. Additional sites may be designated from time to time by the Subcommittee, or the Subcommittee through its investigators. Reasonable advance notice will be provided to the Associate Administrator for Legal and Enforcement Counsel to permit the Agency to review and segregate its files.

During review, the Subcommittee investigators may request executive branch staff to be present to assist the investigators in their review of the documents and to insure that documents

designated as "enforcement sensitive" are properly set aside for stage two (2) review described below. The Subcommittee investigators will be free to obtain copies of the remainder of the files and to otherwise conduct investigations in an appropriate and customary manner. The investigators shall provide EPA with a record of all documents copied pursuant to this Memorandum Of Understanding.

The Administrator, or a formally designated Assistant Administrator, or appropriate Regional Administrator will certify to the Subcommittee that the access provided and the documents produced represent a diligent good faith effort to fully comply with the Subcommittee's request for access and the requirements of this Memorandum Of Understanding, and that the files made available for review by the Subcommittee staff during this phase resulted from a thorough search of EPA offices and that to the best knowledge of the certifying officials, documents have not been purged from these files except in accordance with this Memorandum Of Understanding.

"Enforcement sensitive" documents include sensitive memoranda or notes by government attorneys, investigators, and expert witnesses or other individuals involved in the CERCLA enforcement process that reflect enforcement strategy, legal analysis, lists of potential witnesses, settlement considerations, and similar materials the disclosure of which might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals.

2. "Enforcement sensitive" documents will be set aside for a second stage process. During this stage, in executive session, the Subcommittee and staff will be given redacted copies of the enforcement sensitive documents. The Subcommittee and its staff will be briefed in executive session by attorneys familiar with the documents concerning the material which has been redacted.

3. After executive session briefing, the Subcommittee members will be given an opportunity to review in executive session any redacted document in its complete unredacted form which it finds necessary to review for purposes of its investigation. If upon review of any unredacted document the Subcommittee or the Chairman, in consultation with the Ranking Republican Member, determines that staff expertise is required to fulfill the Subcommittee's responsibilities, the Chairman will specify his concerns setting forth the specific need for Subcommittee staff to review the unredacted document or describe said concerns to a Justice Department official in a discussion with such official. Personnel of the EPA and the Department of Justice will then discuss with the Chairman and explain the meaning of those portions of the documents which the Chairman determines require further clarification. If the Chairman then concludes that staff review is necessary, the Subcommittee, through the Chairman or Ranking Republican Member shall have the right to permit staff participation in executive session review of the unredacted documents, such participation shall be limited to two (2) designated staff persons.

4. If the Subcommittee thereafter determines that it needs to have copies of any of the "enforcement sensitive" documents, it would then have the right to pursue all lawful efforts to obtain the documents in question.

Nothing in this memorandum shall constitute a waiver of Executive Privilege with regard to any document. The Subcommittee does not acknowledge the applicability of Executive Privilege to any document subpoenaed.

5. The redacted copies, and the information disclosed by the documents may be used by the Subcommittee and its staff in questioning EPA-related witnesses. Such witnesses will not be asked to reveal the redacted portions.

The Subcommittee will maintain the confidentiality of specific information obtained from the "enforcement sensitive" documents except that the Executive recognizes Congress' need to draw conclusions, identify problems or issues and address generally other matters as part of its oversight function.

6. This memorandum is intended to solely resolve the issues relative to the subpoena issued by the Subcommittee on Investigations and Oversight of the House vote on December 16, 1982, finding EPA Administrator Anne M. Gorsuch in contempt of Congress and does not bind, or otherwise affect the rights of any other subcommittee of the House with respect to any subpoena which has been or may be authorized.

7. Following satisfactory implementation of the procedures set forth herein, the Chairman of the Subcommittee represents that he will undertake and use his best efforts to introduce an

appropriate resolution, for consideration by the Committee and the House of Representatives. An essential and nonseparable condition of this agreement is that the House of Representatives will adopt a resolution containing recitals that implementation of the procedures established herein constitutes a purging of the aforesaid resolution of the House of Representatives of December 16, 1982, certifying that compliance with the Subcommittee's subpoena has been effected; that the House finds no reason for further proceedings; and providing for the Speaker to certify all of the foregoing to the United States Attorney.

Elliott H. Levitas, Chairman
Subcommittee on Investigations
and Oversight
Committee on Public Works
and Transportation

Fred Fielding
Counsel to the President

Edward Schmults
Deputy Attorney General

Date: February 18, 1983

APPENDIX B

MEMORANDUM OF UNDERSTANDING

1. The Subcommittee on Investigations and Oversight ("Subcommittee") of the House Committee on Public Works and Transportation ("Committee") will obtain access as provided herein to all documents in Environmental Protection Agency ("EPA") files relating to Superfund sites selected by the Subcommittee for review.

2. The Subcommittee, or the Subcommittee through its investigators; will initially designate a reasonable number of National Priority List sites which are the subject of its official inquiries undertaken pursuant to its investigation and oversight responsibilities. Additional sites may be designated from time to time by the Subcommittee, or the Subcommittee through its investigators. Reasonable advance notice will be provided to the Associate Administrator for Legal and Enforcement Counsel to permit the Agency to review its files and identify those documents to be designated as "enforcement sensitive."

3. Such access to files for review by the Subcommittee or its investigators shall be either at EPA or by delivery of such files to the Subcommittee.

4. During its review, the Subcommittee investigators may request executive branch staff to be present to assist the investigators in their review of the documents. The Subcommittee investigators will be free to obtain copies of all documents in the files, subject to the conditions of paragraph 5, and to otherwise conduct investigations in an appropriate and customary manner. The investigators shall provide EPA with a record of all documents copied pursuant to this Memorandum of Understanding.

5. The EPA shall identify at the time of copying or delivery any document or portion thereof that is "enforcement sensitive." The designation of "enforcement sensitive" shall be used to identify any document or portion thereof the public disclosure of which could jeopardize the ability of the Executive Branch to pursue any enforcement action.

6. The Subcommittee agrees to afford any document or portion thereof designated as "enforcement sensitive" the confidential treatment of executive session materials. If the Subcommittee votes to release or use in public session any document or portion thereof designated as "enforcement sensitive", reasonable advance notice with opportunity for consultation shall be given to the EPA. Every effort should be made to reach agreement as to whether or not the document should be released or used in public session. If agreement cannot be reached, such documents shall not be released or used in public session without the concurrence of the Chairman and Ranking Minority Member of the Subcommittee. In the event such concurrence cannot be reached, such documents shall be released or used in public session only upon a further vote of the members of the Subcommittee. The documents shall be kept in a locked safe with sign-in procedures for those obtaining access. Staff access shall be limited to those individuals designated jointly by the Chairman and Ranking Minority Member.

7. Nothing in this memorandum shall constitute a waiver of Executive Privilege with regard to any document. The Subcommittee does not acknowledge the applicability of Executive Privilege to any documents subpoenaed.

8. Title to "enforcement sensitive" documents shall remain in the EPA and shall not transfer to the Subcommittee. Upon notice by the Subcommittee to the EPA that the documents are no longer needed, the EPA may retrieve them.

9. This memorandum is intended to solely resolve the issues relative to the subpoena issued by the Subcommittee on Investigations and Oversight of the House vote on December 16, 1982, finding EPA Administrator Anne M. Gorsuch in contempt of Congress and does not bind, or otherwise affect the rights of any other subcommittee of the House with respect to any subpoena which has been or may be authorized. It supercedes and amends the Memorandum of Understanding dated February 18, 1983, between the parties.

10. Following satisfactory implementation of the procedures set forth in the Memorandum of Understanding dated February 18, 1983, as amended herein, the Chairman of the Subcommittee represents that he will undertake and use his best efforts to introduce an appropriate resolution, for consideration by the Committee and the House of Representatives. An essential and nonseparable

condition of this agreement is that the House of Representatives will adopt a resolution containing recitals that implementation of the procedures established herein constitutes a purging of the aforesaid resolution of the House of Representatives of December 16, 1982, certifying that compliance with the Subcommittee's subpoena has been effected; that the House finds no reason for further proceedings; and providing for the Speaker to certify all of the foregoing to the United States Attorney.

Elliott H. Levitas, Chairman
Subcommittee on Investigations
and Oversight
Committee on Public Works
and Transportation

Fred F. Fielding
Counsel to the President

Edward C. Schmults
Deputy Attorney General
Department of Justice

Date: March 22, 1983

APPENDIX C

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 29 1983

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Compliance With The Memorandum of Understanding With The Subcommittee on Oversight and Investigations Committee on Public Works and Transportation

FROM: Lee L. Verstandig
Acting Administrator Lee L. Verstandig

TO: Regional Administrators
Associate Administrators
Assistant Administrators

As you know, the Environmental Protection Agency is operating under two Memoranda of Understanding (MOU), (see attachments I and II), with the Subcommittee on Investigations and Oversight, House Committee on Public Works and Transportation, which establish procedures for affording Subcommittee staff access to sensitive enforcement documents.

The MOU dated February 18, 1983, (whose terms are largely incorporated in the subsequent MOU dated March 22, 1983), state

> "the Administrator, or a formally designated Assistant Administrator, or appropriate Regional Administrator will certify to the Subcommittee that the access provided and the documents produced represent a diligent good faith effort to fully comply with the Subcommittee's request for access and the requirements of this Memorandum of Understanding, and that files made available for review by the Subcommittee staff during this phase resulted from a thorough search of EPA offices and that to the best knowledge of the certifying officials, documents have not been purged from these files except in accordance with this Memorandum of Understanding."

Subcommittee staff have begun to conduct investigations of the following cases under the terms of the February 18 and March 22 MOUs:

Stringfellow	Bridgeport
Ottati and Goss	Seymour
PAS Oswego	Chem-Dyne
Keefe	FMC (Minn.)

I know that you and your staff have made every effort to cooperate with Subcommittee investigators. To fully comply with the terms of the agreements, I would like each Regional, Assistant, or Associate Administrator whose office has provided or will provide documents to Subcommittee staff for their review or copying to complete a certification as to their good faith efforts to be thoroughly responsive to Subcommittee requests. The certification should read as follows:

> "To the best of my knowledge and belief, I certify that: access provided and documents produced to the Subcommittee on Investigations and Oversight, Committee on Public Works and Transportation, represent a diligent good faith effort to fully comply with the Subcommittee's request for access and the terms of applicable Memoranda of Understanding; there has been a diligent good faith effort to ensure that the files made available for review to the Subcommittee staff resulted from a thorough search of EPA offices under my jurisdiction, and no documents were improperly purged from these files."

The certification should be furnished on a case by case basis to the Subcommittee each time an authorized Subcommittee representative has been provided access to or copies of documents from any offices under your control. Thus it is imperative that you communicate to your staff the need to make a diligent good faith effort to comply with the Subcommittee's document requests.

Regions I, V, and IX, the Office of Solid Waste and Emergency Response, and the Office of Legal and Enforcement Counsel have already received visits from or provided documents to the Subcommittee or its staff. Therefore I would like the heads of each of these offices to prepare a certification and forward the certification to my office, via electronic mail, by COB Monday, May 9. If you have any questions concerning your responsibilities under this memorandum, please contact Thomas L. Adams, Associate General Counsel, Legal and Enforcement Liaison, (382-4539).

Attachments

Memorandum Of Understanding Between
The Committee On Public Works And
Transportation And The Department Of
Justice Concerning Documents Subpoenaed
From Environmental Protection Agency

1. The Subcommittee on Investigations and Oversight ("Subcommittee") of the House Committee on Public Works and Transportation ("Committee") will obtain access to all documents in Environmental Protection Agency ("EPA") files relating to Superfund sites selected by the Subcommittee for review, except those documents designated by EPA or the Department of Justice ("DOJ") to be "enforcement sensitive," as defined herein. The Executive Branch will not shield from Subcommittee review any document that evidences any criminal or unethical conduct by any executive department official or employee.

The Subcommittee, or the Subcommittee through its investigators, will initially designate a reasonable number of National Priority List sites which are the subject of its official inquiries undertaken pursuant to its investigation and oversight responsibilities. Additional sites may be designated from time to time by the Subcommittee, or the Subcommittee through its investigators. Reasonable advance notice will be provided to the Associate Administrator for Legal and Enforcement Counsel to permit the Agency to review and segregate its files.

During review, the Subcommittee investigators may request executive branch staff to be present to assist the investigators in their review of the documents and to insure that documents

designated as "enforcement sensitive" are properly set aside for stage two (2) review described below. The Subcommittee investigators will be free to obtain copies of the remainder of the files and to otherwise conduct investigations in an appropriate and customary manner. The investigators shall provide EPA with a record of all documents copied pursuant to this Memorandum Of Understanding.

The Administrator, or a formally designated Assistant Administrator, or appropriate Regional Administrator will certify to the Subcommittee that the access provided and the documents produced represent a diligent good faith effort to fully comply with the Subcommittee's request for access and the requirements of this Memorandum Of Understanding, and that the files made available for review by the Subcommittee staff during this phase resulted from a thorough search of EPA offices and that to the best knowledge of the certifying officials, documents have not been purged from these files except in accordance with this Memorandum Of Understanding.

"Enforcement sensitive" documents include sensitive memoranda or notes by government attorneys, investigators, and expert witnesses or other individuals involved in the CERCLA enforcement process that reflect enforcement strategy, legal analysis, lists of potential witnesses, settlement considerations, and similar materials the disclosure of which might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals.

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2. "Enforcement sensitive" documents will be set aside for a second stage process. During this stage, in executive session, the Subcommittee and staff will be given redacted copies of the enforcement sensitive documents. The Subcommittee and its staff will be briefed in executive session by attorneys familiar with the documents concerning the material which has been redacted.

3. After executive session briefing, the Subcommittee members will be given an opportunity to review in executive session any redacted document in its complete unredacted form which it finds necessary to review for purposes of its investigation. If upon review of any unredacted document the Subcommittee or the Chairman, in consultation with the Ranking Republican Member, determines that staff expertise is required to fulfill the Subcommittee's responsibilities, the Chairman will specify his concerns setting forth the specific need for Subcommittee staff to review the unredacted document or describe said concerns to a Justice Department official in a discussion with such official. Personnel of the EPA and the Department of Justice will then discuss with the Chairman and explain the meaning of those portions of the documents which the Chairman determines require further clarification. If the Chairman then concludes that staff review is necessary, the Subcommittee, through the Chairman or Ranking Republican Member shall have the right to permit staff participation in executive session review of the unredacted documents, such participation shall be limited to two (2) designated staff persons.

4. If the Subcommittee thereafter determines that it needs to have copies of any of the "enforcement sensitive" documents, it would then have the right to pursue all lawful efforts to obtain the documents in question.

Nothing in this memorandum shall constitute a waiver of Executive Privilege with regard to any document. The Subcommittee does not acknowledge the applicability of Executive Privilege to any document subpoenaed.

5. The redacted copies, and the information disclosed by the documents may be used by the Subcommittee and its staff in questioning EPA-related witnesses. Such witnesses will not be asked to reveal the redacted portions.

The Subcommittee will maintain the confidentiality of specific information obtained from the "enforcement sensitive" documents except that the Executive recognizes Congress' need to draw conclusions, identify problems or issues and address generally other matters as part of its oversight function.

6. This memorandum is intended to solely resolve the issues relative to the subpoena issued by the Subcommittee on Investigations and Oversight of the House vote on December 16, 1982, finding EPA Administrator Anne M. Gorsuch in contempt of Congress and does not bind, or otherwise affect the rights of any other subcommittee of the House with respect to any subpoena which has been or may be authorized.

7. Following satisfactory implementation of the procedures set forth herein, the Chairman of the Subcommittee represents that he will undertake and use his best efforts to introduce an

appropriate resolution, for consideration by the Committee and the House of Representatives. An essential and nonseparable condition of this agreement is that the House of Representatives will adopt a resolution containing recitals that implementation of the procedures established herein constitutes a purging of the aforesaid resolution of the House of Representatives of December 16, 1982, certifying that compliance with the Subcommittee's subpoena has been effected; that the House finds no reason for further proceedings; and providing for the Speaker to certify all of the foregoing to the United States Attorney.

Elliott H. Levitas, Chairman
Subcommittee on Investigations
and Oversight
Committee on Public Works
and Transportation

Fred Fielding
Counsel to the President

Edward Schmults
Deputy Attorney General

Date: February 18, 1983

MEMORANDUM OF UNDERSTANDING

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2. The Subcommittee, or the Subcommittee through its investigators, will initially designate a reasonable number of National Priority List sites which are the subject of its official inquiries undertaken pursuant to its investigation and oversight responsibilities. Additional sites may be designated from time to time by the Subcommittee, or the Subcommittee through its investigators. Reasonable advance notice will be provided to the Associate Administrator for Legal and Enforcement Counsel to permit the Agency to review its files and identify those documents to be designated as "enforcement sensitive."

3. Such access to files for review by the Subcommittee or its investigators shall be either at EPA or by delivery of such files to the Subcommittee.

4. During its review, the Subcommittee investigators may request executive branch staff to be present to assist the investigators in their review of the documents. The Subcommittee investigators will be free to obtain copies of all documents in the files, subject to the conditions of paragraph 5, and to otherwise conduct investigations in an appropriate and customary manner. The investigators shall provide EPA with a record of all documents copied pursuant to this Memorandum of Understanding.

5. The EPA shall identify at the time of copying or delivery any document or portion thereof that is "enforcement sensitive." The designation of "enforcement sensitive" shall be used to identify any document or portion thereof the public disclosure of which could jeopardize the ability of the Executive Branch to pursue any enforcement action.

6. The Subcommittee agrees to afford any document or portion thereof designated as "enforcement sensitive" the confidential treatment of executive session materials. If the Subcommittee votes to release or use in public session any document or portion thereof designated as "enforcement sensitive", reasonable advance notice with opportunity for consultation shall be given to the EPA. Every effort should be made to reach agreement as to whether or not the document should be released or used in public session. If agreement cannot be reached, such documents shall not be released or used in public session without the concurrence of the Chairman and Ranking Minority Member of the Subcommittee. In the event such concurrence cannot be reached, such documents shall be released or used in public session only upon a further vote of the members of the Subcommittee. The documents shall be kept in a locked safe with sign-in procedures for those obtaining access. Staff access shall be limited to those individuals designated jointly by the Chairman and Ranking Minority Member.

7. Nothing in this memorandum shall constitute a waiver of Executive Privilege with regard to any document. The Subcommittee does not acknowledge the applicability of Executive Privilege to any documents subpoenaed.

8. Title to "enforcement sensitive" documents shall remain in the EPA and shall not transfer to the Subcommittee. Upon notice by the Subcommittee to the EPA that the documents are no longer needed, the EPA may retrieve them.

9. This memorandum is intended to solely resolve the issues relative to the subpoena issued by the Subcommittee on Investigations and Oversight of the House vote on December 16, 1982, finding EPA Administrator Anne M. Gorsuch in contempt of Congress and does not bind, or otherwise affect the rights of any other subcommittee of the House with respect to any subpoena which has been or may be authorized. It supercedes and amends the Memorandum of Understanding dated February 18, 1983, between the parties.

10. Following satisfactory implementation of the procedures set forth in the Memorandum of Understanding dated February 18, 1983, as amended herein, the Chairman of the Subcommittee represents that he will undertake and use his best efforts to introduce an appropriate resolution, for consideration by the Committee and the House of Representatives. An essential and nonseparable

condition of this agreement is that the House of Representatives will adopt a resolution containing recitals that implementation of the procedures established herein constitutes a purging of the aforesaid resolution of the House of Representatives of December 16, 1982, certifying that compliance with the Subcommittee's subpoena has been effected; that the House finds no reason for further proceedings; and providing for the Speaker to certify all of the foregoing to the United States Attorney.

Elliott H. Levitas, Chairman
Subcommittee on Investigations
and Oversight
Committee on Public Works
and Transportation

Fred F. Fielding
Counsel to the President

Edward C. Schmults
Deputy Attorney General
Department of Justice

Date: March 22, 1983

APPENDIX D

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 6 1983

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

To the best of my knowledge and belief, I certify that: access provided and documents produced to the Subcommittee on Investigations and Oversight, Committee on Public Works and Transportation, represent a diligent good faith effort to fully comply with the Subcommittee's request for access and the terms of applicable Memoranda of Understanding; there has been a diligent good faith effort to ensure that the files made available for review to the Subcommittee staff resulted from a thorough search of EPA offices under my jurisdiction, and no documents were improperly purged from these files.

Lee M. Thomas
Acting Assistant Administrator
for Solid Waste and Emergency Response

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION V

DATE: MAY 11 1983

SUBJECT: Certification of Good Faith Efforts in Providing Documents to the Subcommittee on Investigations and Oversight

FROM: Valdas V. Adamkus
Regional Administrator

TO: Lee L. Verstandig
Acting Administrator

With regard to the Seymour, Chem-Dyne, and FMC (Minn.) Superfund sites, to the best of my knowledge and belief, I certify that: access provided and documents produced to the Subcommittee on Investigations and Oversight, Committee on Public Works and Transportation, represent a diligent good faith effort to fully comply with the Subcommittee's request for access and the terms of applicable Memoranda of Understanding; there has been diligent good faith effort to ensure that the files made available for review to the Subcommittee staff resulted from a thorough search of EPA offices under my jurisdiction, and no documents were improperly purged from these files.

Valdas V. Adamkus

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region I

MEMORANDUM

DATE: May 11, 1983

SUBJECT: Compliance with the Memorandum of Understanding with the Subcommittee on Oversight and Investigations of the Committee on Public Works and Transportation

FROM: Lester A. Sutton, P.E.
Regional Administrator Paul Keough. Acting

TO: Lee L. Verstandig
Acting Administrator

Representatives of the Subcommittee on Oversight and Investigations of the Committee on Public Works and Transportation have visited Region I offices on two occasions to review and copy documents in connection with the Subcommittee's ongoing investigations and oversight activities relative to the Superfund program. In connection with these two visits, and in connection with our Region's compliance with the Subcommittee's subpoena, I make the following certification as requested in your memorandum of April 29, 1983:

> "To the best of my knowledge and belief, I certify that: access provided and documents produced to the Subcommittee on Investigations and Oversight, Committee on Public Works and Transportation, represent a diligent good faith effort to fully comply with the Subcommittee's request for access and the terms of applicable Memoranda of Understanding; there has been a diligent good faith effort to ensure that the files made available for review to the Subcommittee staff resulted from a thorough search of EPA offices under my jurisdiction, and no documents were improperly purged from these files."

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

DATE: May 9, 1983

SUBJECT: Compliance With The Memorandum of Understanding With The Subcommittee on Oversight and Investigations Committee on Public Works and Transportation

FROM: John Wise, Deputy Regional Administrator, Region 9

TO: Lee L. Verstandig, Acting Administrator

Pursuant to the request set forth in your memorandum of April 29, 1983, to the best of my knowledge and belief, I certify that: access provided and documents produced to the Subcommittee on Investigations and Oversight, Committee on Public Works and Transportation, represent a diligent good faith effort to fully comply with the Subcommittee's request for access and the terms of applicable Memoranda of Understanding; there has been a diligent good faith effort to ensure that the files made available for review to the Subcommittee staff resulted from a thorough search of Region 9's offices, and no documents were improperly purged from these files.

JUN 6 1983

Certification of Compliance with Requests for Access to Documents Received from the Subcommittee on Investigations and Oversight, Committee on Public Works and Transportation

To the best of my knowledge and belief, based upon representations of my staff, I certify that: access provided and documents produced to the Subcommittee on Investigations and Oversight, Committee on Public Works and Transportation, represent a diligent good faith effort to fully comply with the Subcommittee's request for access and the terms of applicable Memoranda of Understanding; there has been a diligent good faith effort to ensure that the files made available for review to the Subcommittee staff resulted from a thorough search of EPA offices under my jurisdiction, and no documents were improperly purged from these files.

Courtney M. Price
Acting Associate Administrator
for Legal and Enforcement Counsel

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APPENDIX E

The Speaker's Rooms
U. S. House of Representatives
Washington, D. C. 20515

December 17, 1982

The Honorable Stanley S. Harris
United States Attorney
District of Columbia

The undersigned, The Speaker of the House of Representatives of the United States, pursuant to House Resolution 632, Ninety-seventh Congress, hereby certifies to you the failure and refusal of Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, to furnish certain documents in compliance with a subpena duces tecum before a duly constituted subcommittee of the Committee on Public Works and Transportation of the House of Representatives, as is fully shown by the certified copy of the House Report 97-968 of said committee which is hereto attached.

Witness my hand and seal of the House of Representatives of the United States, at the City of Washington, District of Columbia, this seventeenth day of December, 1982.

Thomas P. O'Neill, Jr.
Speaker of the House of Representatives

Attest:

Edmund L. Henshaw, Jr.
Clerk of the House of Representatives

Exhibit 7

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Edmund L. Henshaw, Jr.
Clerk

W. Raymond Colley
Deputy Clerk

(61)

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

December 17, 1982

I, Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, do hereby certify, pursuant to Rule III of the Rules of the United States House of Representatives, that the attached is a true and correct copy of House Resolution 632, as adopted by the House of Representatives on December 16, 1982.

In witness whereof, I hereonto affix my name and the Seal of the House of Representatives, in the City of Washington, District of Columbia, this seventeenth day of December, Anno Domini one thousand nine hundred and eighty-two.

EDMUND L. HENSHAW, JR., Clerk
U.S. House of Representatives

H. Res. 632

In the House of Representatives, U. S.,

December 16, 1982.

Resolved, That the Speaker of the House of Representatives certify the report of the Committee on Public Works and Transportation as to the contumacious conduct of Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, in failing and refusing to furnish certain documents in compliance with a subpena duces tecum of a duly constituted subcommittee of said committee served upon Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, and as ordered by the subcommittee, together with all of the facts in connection therewith, under seal of the House of Representatives, to the United States attorney for the District of Columbia, to the end that Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, may be proceeded against in the manner and form provided by law.

Attest:

Edmund L. Henshaw

Clerk.

Edmund L. Henshaw, Jr.
Clerk

W. Raymond Colley
Deputy Clerk

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

December 17, 1982

I, Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, do hereby certify, pursuant to Rule III of the Rules of the United States House of Representatives, that the attached is a true and correct copy of House Resolution 2, as adopted by the House of Representatives on January 5, 1981.

In witness whereof, I hereunto affix my name and the Seal of the House of Representatives, in the City of Washington, District of Columbia, this seventeenth day of December, Anno Domini one thousand nine hundred and eighty-two.

EDMUND L. HENSHAW, JR., Clerk
U.S. House of Representatives

H. Res. 2

In the House of Representatives, U. S.,

January 5, 1981.

Resolved, That the Senate be informed that a quorum of the House of Representatives has assembled; that Thomas P. O'Neill, Junior, a Representative from the Commonwealth of Massachusetts, has been elected Speaker; and Edmund L. Henshaw, Junior, a citizen of the Commonwealth of Virginia, has been elected Clerk of the House of Representatives of the Ninety-seventh Congress.

Attest:

Edmund L. Henshaw

Clerk.

Edmund L. Henshaw, Jr.
Clerk

W. Raymond Colley
Deputy Clerk

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

December 17, 1982

I, Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, do hereby certify, as evidenced by the Journal of the House of Representatives, that the following Members constitute the Committee on Public Works and Transportation: James J. Howard, New Jersey (Chairman); Glenn M. Anderson, California; Robert A. Roe, New Jersey; John B. Breaux, Louisiana; Norman Y. Mineta, California; Elliott H. Levitas, Georgia; James L. Oberstar, Minnesota; Henry J. Nowak, New York; Bob Edgar, Pennsylvania; Marilyn Lloyd Bouquard, Tennessee; John G. Fary, Illinois; Robert A. Young, Missouri; Allen E. Ertel, Pennsylvania; Billy Lee Evans, Georgia; Ronnie G. Flippo, Alabama; Nick Joe Rahall II, West Virginia; Douglas Applegate, Ohio; Geraldine A. Ferraro, New York; Eugene V. Atkinson, Pennsylvania; Donald Joseph Albosta, Michigan; William Hill Boner, Tennessee; Ron de Lugo, Virgin Islands; Gus Savage, Illinois; Fofo I. F. Sunia, American Samoa; Buddy Roemer, Louisiana; Wayne Dowdy, Mississippi; Barbara Kennelly, Connecticut; Brian J. Donnelly, Massachusetts; Ray Kogovsek, Colorado; Don H. Clausen, California; Gene Snyder, Kentucky; John Paul Hammerschmidt,

Arkansas; E. G. Shuster, Pennsylvania; Barry M. Goldwater, Jr., California; Tom Hagedorn, Minnesota; Arlan Stangeland, Minnesota; Newt Gingrich, Georgia; William F. Clinger, Jr., Pennsylvania; Gerald B. Solomon, New York; Harold C. Hollenbeck, New Jersey; H. Joel Deckard, Indiana; Wayne R. Grisham, California; Jim Jeffries, Kansas; Jack Fields, Texas, Guy Molinari, New York; Clay Shaw, Florida; Bob McEwen, Ohio; and Frank Wolf, Virginia.

In witness whereof, I hereby unto affix my name and the Seal of the House of Representatives, in the City of Washington, District of Columbia, this seventeenth day of December, Anno Domini one thousand nine hundred and eighty-two.

EDMUND L. HENSHAW, JR., Clerk
U.S. House of Representatives

APPENDIX F

APPENDIX F

U.S. Department of Justice

United States Attorney
District of Columbia

United States Courthouse, Room 2800
Constitution Avenue and 3rd Street N.W.
Washington, D.C. 20001

December 27, 1982

The Honorable Thomas P. O'Neill, Jr.
Speaker
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

This is in response to your communication of December 17, 1982, certifying to me House Resolution 632 regarding the production of documents by The Honorable Anne M. Gorsuch, Administrator of the United States Environmental Protection Agency.

On December 16, 1982, Civil Action Number 82-3583 was filed by the Department of Justice in the United States District Court for the District of Columbia. In that case, the Department seeks to have the District Court declare that the compelled production of the documents sought by the House of Representatives unconstitutionally would contravene important separation of powers principles, and that the subpoena issued for those documents is constitutionally defective. Pursuant to Section 547 of Title 28, United States Code, I am responsible within this district for prosecuting, for the Government, all civil actions, suits, or proceedings in which the United States is concerned. Accordingly, although the principal work in the pending case is being done by the Civil Division of the Department of Justice, I nonetheless am in the posture of being legally responsible for the prosecution of that civil action for the Government.

Under the same statutory section, I also am responsible for prosecuting, within this district, all offenses against the United States. As part of the discretion which I must exercise as the chief prosecuting officer of this district, a determination must be made as to when a matter should be submitted to a grand jury.

I am keenly aware of the provisions of Section 194 of Title 2, United States Code. It should be noted that that section of the Code quite properly does not include a mandate as to the timing of submitting a matter to a grand jury.

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I recognize the degree of interest which you and your colleagues have in this proceeding. Accordingly, as a matter of courtesy I wish to advise you that I have concluded that it would not be appropriate for me to consider bringing this matter before a grand jury until the civil action has been resolved. While I recognize the likelihood that we are in disagreement over the underlying merits of the controversy, we do have a common interest -- namely, achieving a resolution of the disputed questions as expeditiously as possible and with a minimum of adverse consequences to good government and to the country as a whole. Accordingly, I urge that you pursue with us the use of the pending civil suit as the most effective medium in which to advance the judicial resolution of the controversy.

You may be assured of my continuing and careful attention to this matter.

Respectfully,

Stanley S. Harris

STANLEY S. HARRIS
United States Attorney
District of Columbia

SSH:rm

Copy: Hon. Edmund L. Henshaw, Jr.
Clerk of the House of Representatives

Hon. J. Paul McGrath
Assistant Attorney General
Civil Division
Department of Justice

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

FEB 3 1983

JAMES F. DAVEY, Clerk

UNITED STATES OF AMERICA,
and
ANNE M. GORSUCH,

Plaintiffs,

v.

THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES; THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION OF THE HOUSE OF REPRESENTATIVES; THE HONORABLE JAMES J. HOWARD, CHAIRMAN OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION OF THE HOUSE OF REPRESENTATIVES; THE SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION OF THE HOUSE OF REPRESENTATIVES; THE HONORABLE ELLIOTT J. LEVITAS, CHAIRMAN OF THE SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT OF THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION OF THE HOUSE OF REPRESENTATIVES; THE HONORABLE THOMAS P. O'NEILL, SPEAKER OF THE HOUSE OF REPRESENTATIVES; EDMUND L. HENSHAW, JR., THE CLERK OF THE HOUSE OF REPRESENTATIVES; JACK RUSS, SERGEANT AT ARMS OF THE HOUSE OF REPRESENTATIVES; JAMES T. MOLLOY, THE DOORKEEPER OF THE HOUSE OF REPRESENTATIVES.

Defendants.

Civil Action No. 82-3583

M E M O R A N D U M

The United States of America and Anne M. Gorsuch, in her official capacity as Administrator of the Environmental Protection Agency (EPA), bring this action under the Declaratory Judgment Act, 28 U.S.C. §2201. Plaintiffs ask the Court to declare that Administrator Gorsuch acted

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lawfully in refusing to release certain documents to a congressional subcommittee. Defendants in the action are the House of Representatives of the United States; the Committee on Public Works and Transportation; The Honorable James J. Howard, Chairman of the Committee on Public Works and Transportation; The Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation; The Honorable Elliott J. Levitas, Chairman of the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation; The Honorable Thomas P. O'Neill, Speaker of the House of Representatives; Edmund L. Henshaw, Jr., Clerk of the House of Representatives; Jack Russ, Sergeant at Arms of the House of Representatives; and James T. Molloy, Doorkeeper of the House of Representatives. The individual defendants are sued only in their official capacities. The case is now before the Court on defendants' motion to dismiss.

The essential facts are undisputed. On November 22, 1982, a subpoena was served upon Anne Gorsuch by the Subcommittee on Investigations and Oversight (the Subcommittee) of the Committee on Public Works and Transportation (the Committee). The subpoena required Administrator Gorsuch to appear before the Subcommittee on December 2, 1982, and to produce at that time the following documents:

> all books, records, correspondence, memorandums, papers, notes and documents drawn or received by the Administrator and/or her representatives since December 11, 1980, including duplicates and excepting shipping papers and other commercial or business documents, contractor and/or other technical documents, for those sites listed as national priorities pursuant to Section 105(8)(B) of P.L. 96-510, the "Comprehensive Environmental Response, Compensation and Liability Act of 1980."

On November 30, 1982, President Reagan sent a Memorandum to

Administrator Gorsuch instructing her to withhold from the Subcommittee any documents from open law enforcement files assembled as part of the Executive Branch's efforts to enforce the Comprehensive Environmental Response, Compensation and Liability Act of 1980. On December 2, 1982, the return date of the subpoena, Administrator Gorsuch appeared before the Subcommittee. She advised the Subcommittee that the EPA had begun to gather for production all documents responsive to the subpoena, but ". . . sensitive documents found in open law enforcement files will not be made available to the Subcommittee." 149 Cong. Rec. H10037. The Committee passed a Resolution reporting the matter to the full House of Representatives on December 10, 1982. The full House cited Administrator Gorsuch for contempt of Congress on December 16, 1982. The initial complaint in this case was filed on the same day, one day before the contempt resolution was certified to the United States Attorney for the District of Columbia for presentment to the grand jury. To date, the United States Attorney has not presented the contempt citation to the grand jury for its consideration.

Section 192 of Title 2 of the United States Code provides that a subpoenaed witness who refuses "to produce papers upon any matter under inquiry before either House . . . or any committee of either House of Congress", shall be guilty of a misdemeanor "punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months." Once an individual has been found in contempt by either House of Congress, a contempt order is presented to the President of the Senate or the Speaker of the House of Representatives for

certification. 2 U.S.C. §194. The President or Speaker in turn delivers the contempt citation to the appropriate United States Attorney. The United States Attorney is then required to bring the matter before the grand jury. Id.

The Executive Branch, through the Justice Department, has chosen an alternate route, however, in bringing this civil action against the House of Representatives and individual members of the Legislative Branch. Plaintiffs ask the Court to resolve the controversy by deciding whether Administrator Gorsuch acted lawfully in withholding certain documents under a claim of executive privilege.

Defendants raise several challenges to the propriety of plaintiffs' cause of action. Included among defendants' grounds for dismissal are lack of subject matter jurisdiction, lack of standing, and the absence of a "case or controversy" as required by Article III, §2 of the United States Constitution. In addition, defendants claim that they are immune from suit under the Speech and Debate Clause, Article I, §6, cl. 1. Plaintiffs have addressed and opposed each of these threshold challenges.

The Legislative and Executive Branches of the United States Government are embroiled in a dispute concerning the scope of the congressional investigatory power. If these two co-equal branches maintain their present adversarial positions, the Judicial Branch will be required to resolve the dispute by determining the validity of the Administrator's claim of executive privilege. Plaintiffs request the Court to provide immediate answers, in this civil action, to the constitutional questions which fuel this controversy. Defendants, however, have indicated a

preference for established criminal procedures in their motion to dismiss this case. Assuming there are no jurisdictional bars to this suit, therefore, the Court must initially determine whether to resolve the constitutional controversy in the context of a civil action, or defer to established statutory procedures for deciding challenges to congressional contempt citations.

The statutory provisions concerning penalties for contempt of Congress, 2 U.S.C. §192 and §194, constitute "an orderly and often approved means of vindicating constitutional claims arising from a legislative investigation." Sanders v. McClellan, 463 F.2d 894, 899 (D.C. Cir. 1972). Under these provisions, constitutional claims and other objections to congressional investigatory procedures may be raised as defenses in a criminal prosecution. See Barenblatt v. United States, 360 U.S. 109 (1959); Ansara v. Eastland, 442 F.2d 751 (D.C. Cir. 1971); United States v. Tobin, 306 F.2d 270, 276 (D.C. Cir. 1962). Courts have been extremely reluctant to interfere with the statutory scheme by considering cases brought by recalcitrant witnesses seeking declaratory or injunctive relief. See, e.g., Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Ansara v. Eastland, 442 F.2d at 754. Although the Court of Appeals for this Circuit has entertained one civil action seeking to block compulsory legislative process, that action was brought by the Executive Branch to prevent a private party from complying with a congressional subpoena. See United States v. American Telephone and Telegraph Company, 551 F.2d 384 (D.C. Cir. 1976). Significantly, therefore, in that case the Executive Branch was not able to raise

its claim of executive privilege as a defense to criminal contempt proceedings.

Courts have a duty to avoid unnecessarily deciding constitutional issues. United States v. Rumely, 345 U.S. 41, 45-46 (1952). When constitutional disputes arise concerning the respective powers of the Legislative and Executive Branches, judicial intervention should be delayed until all possibilities for settlement have been exhausted. See United States v. American Telephone and Telegraph, 551 F.2d at 393-395. Judicial restraint is essential to maintain the delicate balance of powers among the branches established by the Constitution. See id. Since the controversy which has led to United States v. House of Representatives clearly raises difficult constitutional questions in the context of an intragovernmental dispute, the Court should not address these issues until circumstances indicate that judicial intervention is necessary.

The gravamen of plaintiffs' complaint is that executive privilege is a valid defense to congressional demands for sensitive law enforcement information from the EPA. Plaintiffs have, thus, raised this executive privilege defense as the basis for affirmative relief. Judicial resolution of this constitutional claim, however, will never become necessary unless Administrator Gorsuch becomes a defendant in either a criminal contempt proceeding or other legal action taken by Congress. See, e.g., Ansara v. Eastland, 441 F.2d at 753-754. The difficulties apparent in prosecuting Administrator Gorsuch for contempt of Congress should encourage the two branches to settle

their differences without further judicial involvement. Compromise and cooperation, rather than confrontation, should be the aim of the parties. The Court, therefore, finds that to entertain this declaratory judgment action would be an improper exercise of the discretion granted by the Declaratory Judgment Act, 28 U.S.C. §2201. See Hanes Corp. v. Millard, 531 F.2d 585, 591 (D.C. Cir. 1976). In light of this determination, the Court will not address the additional grounds for dismissal raised by defendants.

Accordingly, defendants' motion to dismiss is granted.

An appropriate Order follows.

United States District Judge

Dated: February 3, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

FEB 3 1983

JAMES F. DAVEY, Clerk

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, et al.,

Defendants.

Civil Action No. 82-3583

O R D E R

Upon consideration of defendants' motion to dismiss this action, plaintiffs' opposition, the memoranda filed by the parties, oral arguments of counsel and the entire record, it is by the Court this 3rd day of February, 1983

ORDERED that defendants' motion to dismiss is granted and this action is dismissed.

United States District Judge

VIII. House Rules Requirements

COMMITTEE ACTION AND VOTE

Pursuant to clause 2(1)(2) (A), (B) of rule XI, the majority of the Committee having been present, the resolution was adopted by a voice vote.

COMPLIANCE WITH RULE XI, CLAUSE 2(D)(3)

(1) With reference to clause 2(1)(3)(A) of rule XI of the Rules of the House of Representatives, a separate hearing was held on the subject matter of this resolution on June 7, 1983, by the Subcommittee on Investigations and Oversight.

(2) With respect to clause 2(1)(3)(B) of rule XI (requiring the report of any committee on a measure to include a statement required by section 308(a) of the Congressional Budget Act of 1974, if the measure provides new budget authority or new or increased tax expenditures); and clause 2(1)(3)(C) of rule XI (requiring a cost estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Budget Act); neither is applicable as the measure reported by the Committee is neither a bill nor joint resolution.

(3) With respect to clause 2(1)(3)(D) of rule XI, the Committee has not received a summary of the oversight findings and recommendations made by the Committee on Government Operations under clause 4(c)(2) of rule X.

INFLATIONARY IMPACT STATEMENT

With respect to clause 2(1)(4) of rule XI (the inflationary impact on prices and costs in the operation of the national economy), no statement is required as the measure reported by the Committee is neither a bill nor a joint resolution.

CHANGES IN EXISTING LAW

Clause 3 of rule XIII (changes in existing law) is not applicable as the measure reported by the Committee is neither a bill nor a joint resolution.

ADDITIONAL VIEWS OF HON. GENE SNYDER AND HON. GUY V. MOLINARI

We wish to bring attention to a matter which concerns the powers and prerogatives of the House of Representatives. It is one which all Members should be aware of when House Resolution 180 is considered on the Floor.

After the 97th Congress approved the contempt citation against the former Environmental Protection Agency Administrator, Anne M. Burford, the Justice Department made it known that it would not bring the contempt charge against her to the grand jury and, instead, the Department filed a civil suit under the Declaratory Judgment Act in the U.S. District Court in Washington, DC to block enforcement of the contempt citation and the Committee's subpoena. The Justice Department sought declaratory relief arguing that the House's action was unconstitutional because the documents requested were protected by executive privilege, the subpoena was too broad, and the Subcommittee had demonstrated no specific need for the documents.

On February 3, 1983, the District Judge, John Lewis Smith, Jr., dismissed the Justice Department suit on procedural grounds and told both sides "to settle their differences without further judicial involvement." After Judge Smith's decision, Congressman Levitas; Fred Fielding, Counsel to the President; and Edward Schmultz, Deputy Attorney General, began negotiations to work out a way in which the subpoenaed documents could be made available to the Committee and at the same time protect the executive branch's prerogative with regard to enforcement sensitive material. As a result of these negotiations, the principals drafted a Memorandum of Understanding which was signed on February 18, 1983. Because of the difficulty in implementing the February 18 agreement, the principals again negotiated and modified the original Agreement with one dated March 22, 1983.

Paragraph 10 of the Memorandum states that after the procedures for Committee access to EPA documents have been implemented, the Chairman of the Subcommittee on Investigations and Oversight agrees to

> . . . undertake and use his best efforts to introduce an appropriate resolution, for consideration by the Committee and the House of Representatives.

The Memorandum goes on to say that

> . . . an essential and nonseparable condition of this agreement is that the House of Representatives will adopt a Resolution containing recitals that implementation of the procedures established herein constitutes a purging of the aforesaid resolution of the House of Representatives of December 16, 1982, certifying that compliance with Subcom-

> mittee's subpoena has been affected; that the House finds no reason for further proceedings; and providing for the Speaker to certify all of the foregoing to the U.S. Attorney.

It is clear from this language that the contempt of Anne Burford was to be purged through the adoption of such a resolution by the House. However, House Resolution 180, as amended, contains no such recitals in that the resolving clause only requires the Speaker to certify the resolution, reciting additional facts surrounding the contempt citation of Anne M. Burford to the U.S. Attorney. Nowhere in the resolving clause is purgation of contempt addressed as the parties to the Memorandum of Understanding had agreed to on both February 18 and March 22, 1983. In fact, the explicit position of the Majority is that House Resolution 180 is not intended to purge Mrs. Burford of contempt.

It should be pointed out that the preamble to the resolution attempts to set forth the above mentioned recitals, however, according to settled principals of statutory construction, preambles are given little effect by American courts [1] including preambles to resolutions.[2] Furthermore, according to the precedents of the House,[3] preambles are treated separately from the body of the resolution.

It is our position that the resolution could be improved by including the agreed upon recitals in the resolving clause of House Resolution 180. The Subcommittee now has full and complete access to EPA's Superfund files and we should live up to our part of the Agreement by voting to purge Mrs. Burford of contempt.

Aside from the question of the House fulfilling its part of the bargain, an additional concern arises from the Majority position that the resolution does not purge the contempt. By taking this position the Majority, by implication, denies the existence of the House's authority to purge the witness' contemptuous conduct in this case. It is a question of first impression and one that goes to the very essence of this Body's prerogatives and privileges concerning contempt.

It is argued that actions of one Congress cannot be undone by a succeeding Congress. In other words, the action of the 97th Congress citing Mrs. Burford for contempt cannot be reversed by the 98th Congress. To our knowledge, there are no House precedents which address this precise question.

However, in the contempt matter of Francis X. T. Crowley, the House on July 23, 1954, voted to purge the witness of contempt.[4] In this particular instance, the purgation took place in the same Congress but, nevertheless, it did occur. According to the House precedents:

> . . . a witness may be purged of, or freed from, contempt under procedures parallel to those used in citing for contempt: submission of a report to the committee and approval of a resolution authorizing the Speaker to notify the U.S. Attorney to drop the prosecution.[5]

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[1] Sutherland Stat. Const., section 47.04 (4th Ed.).
[2] *Id.* section 29.08 (4th Ed.).
[3] *House Rules and Manual*, section 414 (1983).
[4] *Deschler's Precedents*, Ch. 15, Sec. 21.2.
[5] *Id.* Ch. 15, Sec. 21.

To our knowledge, no one has been able to cite and we have been unable to locate a precedent which stands for the proposition that a purgation is not possible in a subsequent Congress. Furthermore, "Deschler's Precedents" by not addressing the issue at least implicitly supports the view that a purge of contempt by the House is possible without limitation.

While there seem to be no precedents dealing with purgation of contempt in a subsequent Congress, the better interpretation is that there is no distinction between Crowley and the instant case because the contempt violation is against the U.S. House of Representatives as the institution rather than as a particular numerical Congress. Clearly, it is the institution as a whole that has been harmed by this breach of privilege not a separable two year session of the House.

We are hard pressed to understand why a recalcitrant person can be purged of contempt, according to the precedents of the House, up through the last day of a Congress, but the succeeding Congress is powerless to take a similar action only a few days later. Under this theory a person could have up to two years in which to be purged but, after the last day of the Congress in which the violation occurred, purgation would be barred.

This position would erode the contempt power of the House by eliminating the power to purge in situations similar to the one now before the House. The question is one of first impression for this Body and under the better theory the House, in this case, should be recognized as having the authority to purge the contempt. To argue otherwise is to argue for a reduction in the privileges and prerogatives of this Body. We cannot subscribe to this view.

GENE SNYDER.
GUY V. MOLINARI.

○